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IN THE
Supreme Court of the United States

VOTERS EDUCATION COMMITTEE *et al.*

Petitioners,
v.

THE WASHINGTON STATE PUBLIC DISCLOSURE COMMISSION, *et al.*

Respondents.

On Petition For a Writ of Certiorari to the Supreme Court of Washington

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BRIEF FOR THE CENTER FOR COMPETITIVE POLITICS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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INTEREST OF *AMICUS CURIAE*[1]

The Center for Competitive Politics is a non-profit 501(c)(3) organization founded in August 2005, by Bradley Smith, former Chairman of the Federal Election Commission, and Stephen Hoersting, a campaign finance attorney and former General Counsel to the National Republican Senatorial Committee. CCP's mission, through legal briefs, academically rigorous studies, historical and constitutional analysis, and media communication, is to educate the public on the actual effects of money in politics, and the results of a more free and competitive electoral process. CCP is interested in this case because it involves a restriction on political communication that will hinder political competition and information flow.

SUMMARY OF ARGUMENT

In 2002, Congress created the "promote, support, attack, or oppose" standard to serve as one of several anti-circumvention measures necessary to implementing the national political-party-committee soft-money ban. Bipartisan Campaign Reform Act of 2002 ("BCRA") Pub. Law No. 107-155 (Mar. 27, 2002). The standard was upheld by this Court against facial challenge when reviewed within a funding restriction on certain communications made by state political party committees. *See* BCRA § 323(b); 2 U.S.C. § 441i(b). This Court held that the

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[1] This brief is filed with the written consent of all parties. No counsel for a party authoring this brief in whole or in part, nor did any person or entity, other than *Amicus* or their counsel, make a monetary contribution to the preparation or submission of this brief.

"support" or "oppose" standard provides "reasonable opportunity" for sophisticated political actors working in state political party committees to "know what is prohibited" with regard to the funding of communications depicting federal candidates. *McConnell v. FEC*, 540 U.S. 93, 170, n.64 (2003) (discussing BCRA § 323(b); 2 U.S.C. § 441i(b)(1)).

Since Congress' efforts in BCRA, many state legislatures have looked to this Court's opinion in *McConnell*, albeit incorrectly, as permission to employ "support" or "oppose" language in establishing a threshold for political committee status. That the Washington Court has now said openly that the words "support" or "oppose" are sufficiently definite to protect issue advocates from the chill of unwarranted investigation should give pause.

It may be that "*Buckley's* intermediate step of statutory construction on the way to its constitutional holding [the "express advocacy" test] does not dictate a constitutional test." *FEC v. Wisconsin Right to Life, Inc., (WRTL II) (plurality opinion)*. Or it may be that "if a permissible test short of the magic-words test existed, *Buckley* surely would have adopted it." *WRTL II,* 127 S. Ct. at 2674 (Scalia, J., concurring). *Amicus* CCP has no way of knowing whether or which test this Court would adopt as the "constitutional standard for clarity ... in the abstract" now that review has shifted from the Federal Election Campaign Act of 1971, construed in *Buckley v. Valeo*, 424 U.S. 1 (1976), to state campaign-finance restrictions. There are two things that CCP does know, however: The "support" or "oppose" standards are not adequate to protect everyday issue advocates from electoral-speech

prosecutions; and no fewer than 30 states are watching to see whether this Court will nonetheless let Washington's standards stand without review.

This Court must take the time to say that while "support" or "oppose" is constitutional to mark a funding restriction for certain communications made by state political party committees, it is not sufficiently defined to protect citizens searching for the line between issue advocacy and advocacy of election or defeat.

ARGUMENT

The Washington Fair Practices Act, Wash. Rev. Code, chapter 42.17 ("FCPA"), defines "political committee" to mean "any person (except a candidate or an individual dealing with his or her own funds or property) having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition." Wash. Rev. Code § 42.17.020(33) (emphasis added). The Supreme Court of Washington held that, under footnote 64 of this Court's opinion in *McConnell v. FEC*, 540 U.S. 93 (2003), the support or oppose standard was not vague and not limited to express advocacy, and should be enforced to regulate speech that implied opposition to a candidate. *Voters Education Committee v. Washington State Public Disclosure Commission*, 166 F.3d 1174 (Wash. 2007).

In BCRA, Congress used the "promote, support, attack, or oppose" standard in two places; only one of which was reviewed by this Court.[2] Congress

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[2] Congress also used "promote, support, attack, or oppose" as the back-up definition of "electioneering communications" in the

enacted BCRA § 323(b); 2 U.S.C. § 441i(b), which required state, district or local party committees to fund "public communications" that mention clearly identified federal candidates with hard money. This Court did not apply that holding to communications run by everyday citizens' organizations, and did not hold that "support" or "oppose" standards were sufficiently clear, standing alone, to subject core speech to regulation. *McConnell v. FEC*, 540 U.S. 93, 170, n.64 (2003).

The standard as-applied to citizens is overly broad and impermissibly vague: the standard is inherently in the eye of the beholder. The truth is that even State party committees making communications find it is safer to spend federal funds (hard money) for any communication that mentions a federal candidate, or not run the communication at all, rather than guess whether regulatory agencies will later determine their communication did, in fact, "oppose" the candidate mentioned. But this Court has repeatedly stated that genuine issue advocacy, to be "uninhibited and robust," can and must encompass the discussion of candidates, *WRTL II*, 127 S. Ct. at 2669 (quoting *Buckley*), and has rejected political committee status -- with its accompanying source prohibitions, contribution limits, and reporting requirements -- as a prerequisite to engaging in issue advocacy that encompasses candidates. *Buckley*, at 42.

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event this Court struck down the primary definition as unconstitutional. 2 U.S.C. § 434(f)(3)(ii). This Court upheld the primary definition of electioneering communication against facial challenge, *see McConnell*, *supra* at 205-06, and had no occasion to address the constitutionality of the backup definition.

("Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions").

In *Buckley*, the Court noted the threat to robust issue discussion that lies within vague statutes. Section 608 (e)(1) of the Federal Election Campaign Act of 1971, as amended (FECA) provided that "[n]o person may make any expenditure ... relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $ 1,000." *Id.* at 39. The Court noted that the "plain effect of § 608 (e)(1)" was to prohibit persons from "voicing their views 'relative to a clearly identified candidate' through means that entail aggregate expenditures of more than $1,000 during a calendar year." *Id.* at 40. Violations would constitute a "federal criminal offense." *Id.*

The *Buckley* court stated that "vague laws may not only 'trap the innocent by not providing fair warning' or foster 'arbitrary and discriminatory application' but also operate to inhibit protected expression by inducing 'citizens to 'steer far wider of the unlawful zone... than if the boundaries of the forbidden areas were clearly marked.'" *Buckley*, 424 U.S. at 41, n.48, citing *Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972),* quoting *Baggett v. Bullitt, 377 U.S. 360, 372 (1964),* quoting *Speiser v. Randall, 357 U.S. 513, 526 (1958).* The Court noted that "the use of so indefinite a phrase as "relative to" a candidate fails to clearly mark the boundary between permissible and impermissible speech." It held that "[t]he constitutional deficiencies...can be avoided only by reading § 608 (e)(1) as limited to

communications that include explicit words of advocacy of election or defeat of a candidate." *Id.* at 41-42.

The Washington court's opinion conflicts with the law in at least two federal circuits. The United States Court of Appeals for the Fourth and Fifth Circuits in *Center for Individual Freedom, Inc. v. Carmouche*, 449 F.3d 655, 663(5th Cir. 2006) ("*CFIF*") and *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 712-13 (4th Cir. 1999) ("*Bartlett*") have held such "support" or "oppose" standards to be vague.

In *CFIF*, the relevant statute required reporting and disclosure if a person made a payment "for the purpose of supporting, opposing, or otherwise influencing the nomination or election of a person." 449 F.3d at 662-63 (explaining La. Rev. Stat. §§ 18:1501.1(A); 18:1483(9)(a)). The Fifth Circuit found the statute to be vague, and held that:

> To cure that vagueness, and receiving no instruction from *McConnell* to do otherwise, we apply *Buckley's* limiting principle ... and conclude that the statute reaches only communications that expressly advocate the election or defeat of a clearly identified candidate.

CFIF, at 665.

The Washington opinion also conflicts with the Fourth Circuit's opinion in *Bartlett*. The North Carolina statute defined a "political committee" as an entity whose purpose is to "support or oppose any candidate or political party or to influence or attempt

to influence the result of an election." N.C. Gen. Stat. § 163-278.6(14). The Fourth Circuit held the definition vague and did not attempt to save the provision because it found that doing so would be contrary to legislative intent. 168 F.3d at 712-13.[3]

The Washington decision promises the chill of First Amendment freedoms nationwide by casting into doubt the meaning of dozens of similar "support" or "oppose" state statutes which had previously been understood as requiring express advocacy. *See* Petition for Writ of Certiorari, at App. N., p. 190a, *Voters Education Committee v. Washington State Public Disclosure Commission*, 166 F.3d 1174 (Wash. 2007). Without a limiting construction from this Court, the Washington statute simply does not supply the "[p]recision of regulation [that] must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963).

This Court was again faced with drawing the line between issue advocacy and advocacy of elect or defeat in *McConnell v. FEC*, 540 U.S. 93 (2003). There the Court upheld the definition of "electioneering communication," BCRA § 201(a); 2 U.S.C. § 434(f)(3), "to the extent that the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy." *McConnell*, 540 U.S. at 205-206 (2003).

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[3] In *Anderson v. Spear*, 356 F.3d 651, 663-65 (6th Cir. 2004), the Sixth Circuit held that a statute defining "electioneering" as the "solicitation of votes for or against any candidate" was "vague" and, *McConnell* notwithstanding, must be construed to require express advocacy).

This Court held that individual organizations may challenge the breadth of the "electioneering communications" definition as-applied to any set of communications they hoped to run. *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) ("*WRTL I*").

In *Federal Election Commission v. Wisconsin Right to Life, Inc.*, _ U.S. _; 127 S. Ct. 2652 (2007) (*WRTL II*), this Court upheld an as-applied challenge to BCRA Section 203, which makes it a crime for a corporation to use its general treasury funds to pay for any "electioneering communication." *Id.* at 2658. There this Court held that an ad is the "functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 2667. Concurring Justices in *WRTL II* expressed doubt that this standard for as-applied challenges to the breadth of the electioneering communications definition was not itself vague. *See WRTL II, supra* at 2674 (Scalia J., joined by Kennedy J. and Thomas J., concurring). But at least the federal electioneering-communication test for genuine issue advocacy "is only triggered if the speech meets the bright-line requirements of BCRA § 203 in the first place." *WRTL II*, at 2669, n.7. The "support" or "oppose" standards in the Washington statute have no clear 30- or 60-day markers before coming into operation.

It may be that *Buckley* did not determine "what the constitutional standard for clarity was in the abstract, divorced from specific statutory language," and that "*Buckley's* intermediate step of statutory construction on the way to its constitutional holding does not dictate a constitutional test." *WRTL II*, at 2669, n.7. Or, it may be that "if a permissible test

short of the magic-words test existed, *Buckley* surely would have adopted it." *WRTL II*, (Scalia, J., concurring). *Amicus* CCP has no way of knowing which test this Court would adopt as the "constitutional standard for clarity ... in the abstract" now that review has shifted from the Federal Election Campaign Act of 1971, construed in *Buckley*, to state campaign-finance restrictions. But it does not appear that any majority of this Court would accept the "support" or "oppose" standard absent some limiting construction as adequate to protect everyday issue advocates from electoral-speech prosecutions. No fewer than 30 states are watching to see whether this Court will nonetheless let Washington's standards stand without review.

This Court must take the time to say that while a "support" or "oppose" standard is constitutional to mark a funding restriction for certain communications made by state political party committees -- themselves already fully regulated "political committees" -- it is not sufficiently defined to protect citizens seeking to avoid the status of "political committee" and searching honestly for the line between issue advocacy and advocacy of election or defeat.

CONCLUSION

Certiorari should be granted to review the decision of the Washington Supreme Court.

Respectfully submitted,

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